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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAVE THE BAY, INC.,
Petitioner

v.

U.S. CORPS OF ENGINEERS, *et al.*,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States District Court and the Court of Appeals for the Fifth Circuit erred in ruling that:

a) The preparation of an Environmental Impact Statement is not necessary in this case because

1) An environmental assessment by the district engineer was reasonable and based on substantial evidence;

2) The activity herein is not a major federal action significantly affecting the quality of the human environment.

b) In issuing a permit for an outfall pipeline to deliver 2,300,000 gallons of pollutants per day from a massive chemical plant, the Corps of Engineers is not required to consider the environmental cost of the entire project but only the effects of the installation and maintenance of the outfall line itself.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Judgment and Opinion Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	4
Reasons for Granting The Writ	8
Conclusion	12
Certificate	13
Appendix A	
Opinion of the United States Court of Appeals for the Fifth Circuit	1a

TABLE OF AUTHORITIES

CASES:

Citizens for Clean Air, Inc. v. *U.S. Corps of Engineers, et al.*, 349 F. Supp. 696 (S.D.N.Y. 1972)	11
Mahelona v. *Hawaiian Electric Company*, 418 F. Supp. 1328 (D. Hawaii 1976)	11
Port of Astoria v. *Hodel*, 8 ERC 1156, Aff'd, 595 F.2d 467 (9th Cir. 1979)	11

STATUTES:

Title 28, USC Section 4332(2)(c)	2
40 CFR 1500.6(a)	3, 9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAVE THE BAY, INC., respectfully petitions for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court, Southern District of Mississippi, Southern Division, refusing to require the U.S. Corps of Engineers to prepare an Environmental Impact Statement as provided under the National Environmental Policy Act with respect to an outfall pipeline which will discharge 2,000,000 gallons per day of industrial waste water into a pristine estuarian bay from a massive titanium dioxide chemical plant being constructed by E. I. DuPont de Nemours and Co., Inc.

JUDGMENT AND OPINION BELOW

The judgment of the United States District Court refusing to require the U.S. Corps of Engineers to prepare an Environmental Impact Statement and refusing the injunctive relief requested by Petitioner, was affirmed by the United States Court of Appeals for the Fifth Circuit in an Opinion dated January 24, 1980, reported at 610 F.2d 322; Petition for rehearing denied, March 17, 1980. The opinion and the denial of rehearing are attached hereto in Appendix A.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed was rendered on January 24, 1980.

The per curiam amendment to the Opinion and denial rehearing was rendered March 17, 1980.

The jurisdiction of this Supreme Court is based on 28 USC 1245.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Title 28, USC Section 4332(2) (c)

"The Congress authorizes and directs that to the fullest extent possible. . .

2. All agencies of the Federal Government shall:

(c) Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a detailed statement (EIS) by the responsible official on:

(i) The environmental impact of the proposed action,

(ii) Any adverse and environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented . . .

2. Counsel of Environmental Quality Regulations 40 CFR 1500.6(a)

"The statutory clause 'major Federal actions significantly affecting the quality of human environment' is to be construed by agencies with a *view to the overall, cumulative impact of the action, proposed related Federal actions and projects in the area, and further actions contemplated.* Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be hightly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, *agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable.* This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several government agencies individually make decisions about partial aspects of a major action. In all such cases, an Environmental Statement should be prepared if

it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. The Council, on the basis of a written assessment of the impacts involved, is available to assist agencies in determining whether specific actions require impact statement." 40 CFR 1500.6(a)

STATEMENT OF THE CASE

The Plaintiff, SAVE THE BAY, INC. is a non-profit corporation organized under the laws of the State of Mississippi. Its members consist of full time and part time residents of Harrison and Hancock Counties in the State of Mississippi and of the vicinity of the Bay of St. Louis (Tr. 1158). The Defendant, DuPont, is a private corporation incorporated under the laws of the State of Delaware, the Federal Defendants are the United States Army, the United States Corps of Engineers, an agency of the United States Government within the Department of the Army, and Colonel Drake Wilson, formerly the District Engineer for the Mobile District of the Corps. (Tr. 1158). The Defendant, DuPont, is presently constructing and plans to operate a massive titanium dioxide manufacturing facility representing an investment of between one hundred twenty-five and one hundred thirty million dollars, (Tr. 293, 471) and encompassing over two thousand acres of land (Tr. 292, 474), (general exhibits 1-4) in Delisle, Mississippi near the Bay of St. Louis, in Harrison County, Mississippi. The plant operation and construction includes waste emission smoke stacks, deep-well disposal of highly toxic chemical wastes, and a pipeline to dump chemical wastes into the Bay of St. Louis as hereafter described. On November 21, 1974, DuPont sought authorization from the Defendant U.S. Corps of Engineers, to install a 24 inch diameter effluent line to discharge approximately two million gallons of industrial pollutants per day (Tr. 505-506) into the Bay of St. Louis. The outfall line

itself extends approximately 2,200 feet into the Bay and is installed by the dredging of a trench resulting in the removal of 610 cubic yards of dredged material.

From the very beginning, the Corps of Engineers considered the question as to whether all or part of the proposed construction should be considered as candidate for an Environmental Impact Statement (Tr. 284), but the Corps determined that only construction of the 24 inch effluent line and appurtenant structures were subject to Corps regulation and thus the Corps limited its assessment, evaluation and evaluation and analysis solely to that feature of the plant construction (Tr. 285).

On February 3, 1975, the Mississippi Air and Water Pollution Control Commission, issued a National Pollutant Discharge Elimination Systems permit to DuPont allowing discharge of the waste water in accordance with the conditions of the permit.

Following solicitation of comments from federal, state and local agencies concerning the proposed pipeline construction permit, the Corps of Engineers announced a public hearing would be held on June 19, 1975, to answer any questions concerning issuing of the pipeline construction permit. In keeping with the Corps' prior determination that only the construction of the pipeline was subject to their regulation, the public notice for the hearing was limited to the installation of the 24 inch diameter pipeline and made no mention of consideration of other aspects of the DuPont Plant in the issuance of its permit. On June 19, 1975 the hearing was held and all proponents and opponents were allowed to express their views. The proponents consisted mostly of governmental or business organizations and generally testified as to the favorable economic impact the plant would have. The opponents, consisting mostly of ecological and recreational organizations, and scientists, testified that the environmental damage and impact of the DuPont

project will reach far beyond deterioration of the water quality and that potential dangers to the marine and land environment necessitated the minimal protection of an environmental impact statement.

The vast majority of the public response and virtually all the authoritative scientific evidence was unalterably opposed to the location of the DuPont plant in its selected site; opposed to the granting of the permit for the outfall pipeline; and overwhelmingly in favor of the initiation by the Corps of Engineers of a comprehensive Environmental Impact Statement.

On July 17, 1975, the U.S. Corps of Engineers issued a statement of Findings allegedly assessing the impact the proposed activity would have on the environment. The Corps findings, as was its public notice, was predicated on the initial determination that the only potential environmental damages which the Corps would assess would be those adverse affects caused directly by the construction of the 220 feet outfall line and excavation of 610 cubic yards of dredged material from the Bay.

The Corps explicitly stated that all other environmental damages caused by the massive DuPont titanium dioxide plant would not be assessed and were not included in the Corps decision to not require an environmental impact statement.

Based on the administrative record, which was replete with demands for an environmental impact statement and which evidenced one of the most controversial environmental issues ever to appear in the State of Mississippi, the Corps nevertheless directed that the permits be issued without the protection of an environmental impact statement.

The Plaintiff, SAVE THE BAY, INC. brought suit pursuant to the National Environmental Policy Act (NEPA 28 USC 4321 ex seq) against the United States

Corps of Engineers, the United States Army, Colonel Drake Wilson, Mobile District Office of the Corps of Engineers, and DuPont seeking declaratory and injunctive relief and monetary damages. The case was referred to the United States Magistrate by the District Judge and thereafter the Defendant's Motions for Summary Judgment were granted and judgment was entered December 16, 1977 dismissing the complaint with prejudice.

Plaintiff, SAVE THE BAY, INC. appealed. On January 24, 1980 the U.S. Court of Appeals for the Fifth Circuit issued an opinion affirming the District Court's opinion and denying Plaintiff the relief requested.

The DuPont plant is now almost in operation. The construction was begun and has been continuing despite three years of pleas by Appellant, SAVE THE BAY, INC. for the very minimal protection of an Environmental Impact Statement.

So far DuPont has obtained or is attempting to obtain permits from the following agencies:

1. Mississippi Air and Water Pollution Control Commission,
2. Mississippi Marine Resources Counsel,
3. Mississippi Oil and Gas Board,
4. United States Army Corps of Engineers,
5. United States Coast Guard, and
6. The Interstate Commerce Commission.

Not one of these agencies prepared or is attempting to prepare an Environmental Impact Statement on the DuPont project.

The perspective of each agency when approached for a permit has been to consider piecemeal only that part of the massive project which is directly regulated by

that particular agency. The State agencies have studied only a simulated effluent to be discharged into the Bay of St. Louis at the rate of 2,000,000 gallons per day. Those State agencies have further allowed the installation and use of deep-well disposal of highly toxic chemical wastes on the DuPont plant site which will one day endanger the water supply of the entire Mississippi Gulf Coast. The United States Coast Guard has issued a bridge permit to allow construction of a railroad bridge pursuant to a railroad spur being built to the DuPont plant. The Interstate Commerce Commission has issued a permit to allow operation of the same railroad spur. The United States Corps of Engineers has issued the outfall construction permit in the instant case as well as another permit relative to the railroad spur.

The massive DuPont chemical plant could not be built, could not operate and could not damage the environment without the issuance of these vital federal permits. The permits not only allow construction, they allow massive environmental impact.

The Court of Appeals for the Fifth Circuit has determined that the Corps acted reasonably. The Court said the Corps was justified in assessing only the environmental damage due to construction aspects of the twenty-two hundred feet of pipeline and has no duty to consider the obvious and substantial environmental damages caused by the massive chemical plant itself.

We strongly dissent.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals that federal permitting agencies, in issuing permits for portions of private construction projects must only review the environmental damage of the particular portion of the project which that federal agency regulates is directly contrary

to an explicit regulation of the Council on Environmental Quality and in conflict with the prior environmental decisions of this Court and other Circuit Courts of Appeal.

In concrete terms for the Petitioner herein the decision will mean that E. I. DuPont can build a $150,000,000 titanium dioxide chemical plant with appurtenant structures for the deep well injection of highly toxic wastes and for piping 2,000,000 gallons of industrial waste water a day to dump into a pristine estuarian bay, and an adjacent thirteen mile railroad spur to ship in chlorine gas and other chemicals and that all of the federal permits necessary for this construction can be issued without the very minimal protection of an Environmental Impact Statement.

I.

The Court of Appeals classification of the entire federal permitting system as "incidental involvement" in massive private construction projects for the purposes of NEPA analysis adopts the piecemeal "blinder" approach which has been rejected by every Circuit Court and by the Council on Environmental Quality (CEQ).

The CEQ Regulation in question, 40 CFR 1500.6(a) (set forth verbatim at page 3 herein) explicitly states:

> "In considering what constitutes major (federal) action significantly affecting the environment, agencies should bear in mind that the effect of many *federal decisions* about a project or complex of projects *can be individually limited but cumulatively considerable.* This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several government

agencies individually make decisions about partial aspects of a major action.

"*In all such cases,* an EIS should be prepared. . ."

In the case *sub judice,* the Court of Appeals panel in oral argument and in its Opinion under the section entitled "A Major Federal Action?" took the position that issuing federal permits was merely "incidental federal involvement" and did not federalize the massive private construction. The panel's position is taken despite the intimate involvement of four federal agencies in reviewing and issuing the numerous federal permits necessary for the massive chemical plant, the deep-well toxic waste disposal, the railroad constructed to the plant and the waste-water pipeline constructed to dump 2,000,000 gallons a day of industrial wastes into the Bay of St. Louis.

NEPA was passed specifically to halt the multi-agency, piecemeal consideration of environmental impact. NEPA's whole essence is the comprehensive assessment of environmental impact in the planning stages of a project. The decision here is to throwback to pre-NEPA 1969 thinking.

II.

The second question presented, and as the Court of Appeals noted, perhaps the point which controls the outcome of the case, is the ruling that the Corps must look only to the environmental consequences of the pipeline construction and maintenance instead of considering the entire DuPont project in its decision on whether or not to prepare an EIS.

Without the federal permits, including the Corp's permit for construction of the waste-water pipeline directly from the massive plant over wet lands to the Bay of St. Louis, the DuPont project could not have been built and could not exist.

This massive chemical plant is analogous to a living organism which eats chlorine gas and at the other end excretes toxic wastes and industrial pollutants at the rate of over 2,000,000 gallons per day. Without the permit, there would be no pipeline. Without the pipeline, the plant would suffocate in its own waste and the Bay of St. Louis would live. With the pipeline, the Bay of St. Louis will die.

To allow the Corps to put on blinders and completely ignore the environmental ramifications of the federal permits is the most niggardly, narrow-minded approach to environmental planning that one can imagine

The cases of *Port of Astoria* v. *Hodel*, 8 ERC 1156, Aff'd 595 F.2d 467 (9th Cir. 1979), *Mahelona* v. *Hawaiian Electric Company*, 418 F. Supp. 1328 (D. Hawaii 1976) and *Citizens for Clean Air, Inc.* v. *U.S. Corps of Engineers, et al.*, 349 F. Supp. 696 (S.D.N.Y. 1972) provide a sound analysis for Petitioner's position that the whole project must be considered and not just 2,200 feet of pipe. We respectfully disagree with the Court of Appeals that those cases are distinguishable.

The Corps approach, affirmed by the Opinion of the Court of Appeals, allows an environmental analysis of 2,200 feet of pipe just as if the pipe was lying out in the marshes of South Mississippi without a massive chemical plant at one end and 2,000,000 gallons a day of industrial waste spewing out the other end. We expect that type of attitude from the U.S. Corps of Engineers, but we are keenly disappointed that the attitude also prevails in the Fifth Circuit Court of Appeals.

CONCLUSION

This case is the most important environmental law case ever to come out of the State of Mississippi. A review of this case by the Supreme Court and a reversal of the precedent set by the Court of Appeals regarding the federal permitting system is necessary to the continued vitality and existence of NEPA in the Fifth Circuit. The case offers a clear opportunity for this Court to make a pronouncement concerning the effect of the massive federal permitting program on environmental law and environmental impact statements.

We respectfully and urgently ask this Honorable Court to grant our Petition for Writ of Certiorari.

Respectfully submitted,

SAVE THE BAY, INC.,
PETITIONER

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CERTIFICATE

I, ROBERT W. SMITH, attorney for the Petitioner, do hereby certify that I have this day mailed a copy of the Writ of Certiorari, via U.S. Mail, postage prepaid to:

Chief Appellate Section
Land and Natural Resources Division
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DONE, this the 2nd day of June, 1980.

/s/ Robert W. Smith
ROBERT W. SMITH

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-1432

SAVE THE BAY, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES CORPS OF ENGINEERS, UNITED STATES ARMY, COLONEL DRAKE WILSON, and E.I. DU PONT DE NEMOURS AND COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

Jan. 24, 1980.

Before BROWN, TJOFLAT and GARZA, Circuit Judges.

GARZA, Circuit Judge:

Appellant appeals from refusal of the United States Magistrate, acting on behalf of the District Court by consent of the parties, to require the United States Corps of Engineers to prepare an Environmental Impact Statement (EIS) as provided for under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* Appellants argue the Court below erred in concluding that the environmental assessment by the district engineer was reasonable and based on substantial evidence, that the activity involved was not a major federal action significantly affecting the quality of the human environment, and that the Corps of Engineers was not required to consider the environmental consequences of the entire project but only the effects of the installation

and maintenance of a twenty-four inch outfall pipeline. Appellees argue on appeal that Appellants have no standing to challenge the actions of the Corps of Engineers. For the reasons stated below, we affirm the ruling of the United States Magistrate.

FACTS

At the time this litigation began, the defendant, E.I. Du Pont De Nemours & Co., Inc., proposed to construct and operate a massive titanium dioxide manufacturing facility in Delisle, Mississippi. Pursuant to this plan, Du Pont sought necessary authorization and permits from appropriate state and federal agencies.

On November 21, 1974, Du Pont sought authorization from the defendant, Army Corps of Engineers, to install a twenty-four inch diameter effluent line into the marshlands and Bay of St. Louis. The effluent line would carry approximately two million gallons per day of industrial wastewater and discharge it into the Bay of St. Louis. The line would be approximately 2,200 feet in length extending into the Bay and construction would require removal of 610 cubic yards of dredged material from the Bay.

On February 3, 1975, the Mississippi Air and Water Pollution Control Commission, acting pursuant to authority delegated to it by the Environmental Protection Agency, issued a National Pollutant Discharge Elimination System (NPDES) permit to Du Pont allowing discharge of the wastewater in accordance with the conditions of the permit.

Following solicitation of comments from federal, state and local agencies concerning the proposed pipeline construction permit, the Corps of Engineers announced a public hearing would be held on June 19, 1975, to answer any questions concerning issuing of the pipeline construc-

tion permit. In keeping with the Corps' prior determination that only the construction of the pipeline was subject to their regulation, the public notice for the hearing was limited to the installation of the twenty-four inch diameter pipeline and made no mention of consideration of other aspects of the Du Pont plant in the issuance of its permit. On June 19, 1975 the hearing was held and all proponents and opponents were allowed to express their views. The proponents consisted mostly of governmental or business organizations and generally testified as to the favorable economic impact the plant would have. The opponents, consisting mostly of ecological and recreational organizations, testified generally that a potential danger to marine life existed and that an Environmental Impact Statement was necessary.

On July 17, 1975, Colonel Drake Wilson, District Engineer for the Mobile Corps of Engineers, issued a Statement of Findings assessing the impact the proposed activity would have on the environment. The Corps determined there would be no adverse effect on air quality and that water quality would be only temporarily affected. The findings also noted the issuance of the NPDES permit and that the Environmental Protection Agency had no objection to the issuance of the Corps' permit. The statement, also taking into consideration the determinations of the Mississippi Marine Resources Council and the Gulf Coast Research Laboratory, found there would be no significant adverse effect on land use, visual aesthetics, wildlife, sealife, vegetation, or historical interests. Based on the administrative record, Colonel Wilson directed that the permit be issued. The permit only authorized building the pipeline and was subject to several conditions, one of which required that Du Pont have a proper NPDES permit governing the effluent discharge.

The Plaintiff, Save the Bay, Inc., brought suit pursuant to the National Environmental Policy Act (NEPA)

against the United States Army Corps of Engineers, the United States Army, Colonel Drake Wilson, Mobile District Office of the Corps of Engineers, and Du Pont seeking declaratory and injunctive relief and monetary damages. The case was referred to the United States Magistrate by the District Judge and thereafter the defendant's Motions for Summary Judgment were granted and judgment was entered December 16, 1977 dismissing the complaint with prejudice.

STANDING

Save the Bay's complaint alleges that it is a nonprofit corporation organized under the laws of the State of Mississippi; that its membership is primarily composed of numerous full-time and part-time residents of Harrison and Hancock Counties in the State of Mississippi; and that its members will be adversely affected economically, aesthetically and environmentally.

Appellee Du Pont urges on appeal that Save the Bay has failed to establish standing under § 10 of the Administrative Procedures Act, 5 U.S.C. § 702. Specifically, Du Pont argues that under *Sierra Club* v. *Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and *United States* v. *SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), Save the Bay must allege that its members "use" the area and that the proposed federal action will significantly affect their "use". Du Pont's reliance on *Sierra Club* v. *Morton*, *supra*, is misplaced. Here, the Plaintiff has alleged economic, aesthetic and environmental injury to its members and clearly has gone beyond mere general allegations of grievance on behalf of the public interest. Du Pont's argument, that failure to specifically allege "usage" of the geographic area is fatal to Plaintiff's standing, is without merit. An obvious inference of the English language is that residents of a geographical area "use" that geographical

area. An allegation of residence coupled with an allegation of injury caused by federal action affecting the area of that residence clearly demonstrates that the party seeking review is among those injured. We fail to see how the acts of camping, hiking, fishing or sightseeing, in a particular geographic location, held sufficient for standing in *United States* v. *SCRAP*, *supra*, can be considered more relevant for purposes of standing than can the act of residing in a particular geographic location.

REASONABLENESS OF THE CORPS' DECISION

The Court below noted that the standard for review of an agency determination that an Environmental Impact Statement need not be prepared is whether such determination is reasonable. This standard was set forth by this Court in *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463 (5th Cir. 1973). If the determination is reasonable and made objectively and in good faith on a reviewable environmental record, the determination must be upheld. The Court below found that the environmental assessment prepared by the Corps completely and fully addressed the possible environmental consequences, that the assessment was based on substantial evidence, and that Corps complied with appropriate federal statutes and regulations. Appellants contend that the Corps' determination was unreasonable. They argue that the testimony and evidence offered in opposition to the building of the pipeline and plant should compel the conclusion that an EIS is required. The Appellants further argue that the Corps abdicated its responsibilities by failing to conduct independent studies and by considering the evaluations of other governmental agencies concerning the pipeline's potential adverse effects.

We do not agree with Appellant's contentions. Without detailing every point and counter-point of evidence before the Corps, it is clear that the Corps had testimony, evidence and comments from individuals and gov-

ernmental agencies which could lead it to reasonably conclude that an EIS would not be necessary. The Corps received and reviewed comments from several governmental agencies [1] as well as from quasi-governmental and business organizations. With little exception, all comments from governmental agencies indicated there would be no significant adverse impact on the environment. We cannot agree with Appellant that consulting with these agencies was improper. The National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) requires that federal agencies consult with other agencies whose area of expertise is superior to their own. Of course, this should not be understood as allowing the Corps to base their determination solely on the comments of other agencies. Perhaps the most basic requirement of NEPA is that all federal agencies make an *independent* environmental assessment of the proposed action. The Court below correctly recognized this in distinguishing this case from *Mahelona* v. *Hawaiian Electric Company*, 418 F.Supp. 1328 (D. Hawaii 1976) wherein the Corps of Engineers erroneously considered the advisements of the EPA as determinative and consequently failed to independently determine whether or not the proposed action would have a significant impact on the human environment. For these reasons we hold the Corps' decision was not unreasonable.

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[1] Among those agencies were the following: the Environmental Protection Agency, the Department of Interior, Fish and Wildlife Service, the Department of Commerce, the National Oceanic and Atmospheric Administration, the Mississippi Marine Resources Council, the Mississippi Air and Water Pollution Control Commission, and the Mississippi State Clearing House for Federal Programs.

A MAJOR FEDERAL ACTION?

Appellants contend the court below erred in not finding the grant of the pipeline construction permit was a "major Federal action significantly affecting the quality of the human environment", under 42 U.S.C. § 4332(2)(C), and therefore requiring preparation of an EIS. In furtherance of this contention they argue that granting almost any Federal permit to this massive multimillion dollar manufacturing plant should trigger the obligations of NEPA.

The Court below held that the provisions of NEPA must be read in context of other language in the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 *et seq.*, which places control of water pollution caused by discharges of effluents in the hands of the states and the EPA. *United States* v. *SCRAP, supra.* The court went on to hold, citing *Sierra Club* v. *Hodel*, 544 F.2d 1036 (9th Cir. 1979) and *Port of Astoria* v. *Hodel*, 8 ERC 1156, aff'd 595 F.2d 467 (9th Cir. 1979), that the issuance of the Corps' permit was not a sufficient nexus between the Corps and construction of the Du Pont plant to make the Corps a partner in such construction and thereby "federalize" the construction of the Du Pont plant. In other words, the granting of the pipeline permit by the Corps was not a "major Federal action" within the meaning of NEPA.

In addition to the Court's holding, it should also be noted that FWPCA, 33 U.S.C. § 1371(c)(1),[2] ordinarily

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[2] 33 U.S.C. § 1371(c)(1) and (2) provides as follows: (c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Adminis-

prohibits the issuance of a NPDES permit from being deemed a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. Furthermore, § (c) (2) prohibits Federal agencies, under guidance of NEPA, from reviewing any effluent limitation under a NPDES permit or from imposing any effluent limitation as a condition precedent to issuance of a license.

The decision of the Court below in no way held that the Corps was precluded from preparing an EIS because of FWPCA, but instead held that the Corps' determination, of whether or not issuance of the construction permit was a "major Federal action", was limited to construction and operation of the pipeline itself and correctly held that the environmental consequences of the effluent was a factor to be excluded from their consideration.

In reaching our conclusion on this point we are not unmindful of the impact that building of this massive manufacturing plant will have on the people of Harrison

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trator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852); and (2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

> (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title, or
>
> (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

and Hancock Counties, but the requirements of NEPA do not reach private acts—only "major Federal actions." We fail to see how granting of the pipeline construction permit, after issuance of a valid NPDES permit, can be considered a major Federal action. An examination of the guidelines issued by the Council on Environmental Quality, 40 C.F.R. 1500.6(c), indicates that a private project does not become a "major Federal action" merely because of some incidental federal involvement. In this case, the pipeline itself was not a necessity for operation of the plant. At least one alternative method of discharge, not requiring any Corps permit, was available to Du Pont. We are not saying that the requisite Federal action must be a condition precedent to private action in order for preparation of an EIS to be required. But we do hold that in order for there to exist "major Federal action" some greater involvement, than is present in the case at hand, must exist.

THE PIPELINE OR THE WHOLE PLANT?

Appellant's most vigorously argued point on appeal and perhaps the point which would control the outcome of this case contests the Corps looking only to the environmental consequences of the pipeline construction and maintenance instead of considering the entire Du Pont project in its decision on whether or not to prepare an EIS.[3] Appellants assert that narrowing the scope of inquiry to the pipeline construction alone is the "blinder" approach which should be rejected by this Court. By analogy they compare the Du Pont facility to a living organism which at one end eats chlorine gas and at the other end excretes hydrocloric acid, iron, chromium, zinc, and other nastiness to the tune of 2,000,000 gallons per day. Their argument is that but for the permit there

[3] We express no opinion as to the proper scope and extent of coverage of an EIS should one have been necessary.

would be no pipeline; without the pipeline there would be no excretion; without the ability to excrete the plant would suffocate in its own waste. They argue that the permit "enables" the plant to exist and therefore the entire plant should be taken into consideration in whether or not the pipeline construction permit should be issued. In support of this "Enablement Theory", appellants cite *Port of Astoria* v. *Hodel, supra, Mahelona* v. *Hawaiian Electric Company, Inc., supra,* and *Citizens for Clean Air, Inc. et al.* v. *United States Army Corps of Engineers et al.*, 349 F.Supp. 696 (S.D.N.Y.1972).

Upon review of these cases, this Court does not disagree with their reasoning but the circumstances of those cases are clearly distinguishable from those before us. The case of *Citizens for Clean Air* preceded the FWPCA Amendments of 1972 and therefore is no longer supportive of the proposition advanced here. In *Port of Astoria* there existed a long-term contractual relationship between a Federal agency and a private corporation in which the proposed private manufacturing plant was entirely dependent upon electrical power to be supplied by the Federal agency. In *Mahelona* the problem was not that the Corps failed to examine the effects of the electrical generating plant, but rather failed to review the consequences of its own construction permit allowing a wastewater discharge facility. In short, the results of these cases do not compel the conclusion which the Appellants desire. Absent facts or circumstances which are not present here, we decline to hold that NEPA required the Corps as a matter of law to consider the entire Du Pont facility in determining whether or not an EIS was necessary.

AFFIRMED.